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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL DEAN GORHAM,

Defendant and Appellant.

F043475

(Super. Ct. No. 1047466)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. Loretta Murphy Begen, Judge.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

Appellant, Russell Dean Gorham, was found guilty after a jury trial of transporting a controlled substance (Health & Saf. Code, § 11379, count one), possession of a controlled substance (Health & Saf. Code, § 11378, count two), possession of a controlled substance (Health & Saf. Code, § 11370.1, count three), and being an ex-felon in possession of a firearm (Pen. Code, § 12021, count four). The jury found true an enhancement alleged as to counts one and two that Gorham was armed with a firearm when he committed his offenses (Pen. Code, § 12022, subd. (c)).<sup>1</sup> In a bifurcated proceeding, the trial court found true four prior serious felony convictions within the meaning of the three strikes law.<sup>2</sup>

The trial court denied Gorham's request to strike one or more of his prior serious felony convictions finding that Gorham had committed new offenses after being released from prison and that even some of his misdemeanor offenses were violent. The court refused to exercise its discretion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. When the court turned to the issue of sentencing Gorham, the parties agreed that counts two and three had to be stayed pursuant to section 654. Defense counsel concurred with the prosecutor that the trial court, however, had no discretion to impose anything but consecutive 25 years to life sentences on counts one and four.

The trial court expressly found it had no discretion other than to sentence Gorham consecutively on counts one and four. The court sentenced Gorham to prison for 25 years to life on count one plus 4 years for the arming enhancement. The court sentenced Gorham to prison for a consecutive 25 years to life term on count four for a total prison term of 54 years to life. The trial court imposed a restitution fine and granted applicable custody credits.

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<sup>1</sup> Unless otherwise noted, all further statutory references are to the Penal Code.

<sup>2</sup> Gorham had two felony burglary convictions in Indiana, and two felony robbery convictions. One robbery was in Indiana and the other was in Florida.

Appellate counsel filed a brief stating there were no arguable issues of law or fact pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In reviewing Gorham's sentence, however, we detected error in the trial court's understanding and exercise of its sentencing discretion concerning imposition of consecutive 25 years to life sentences.

### **FACTS**

On September 23, 2002 at 3:30 a.m., California Highway Patrol Officers Timothy Fautt and John French responded to a report of suspicious activity at a rest stop on Highway 99. People were allegedly selling stolen property from a blue vehicle. When the officers arrived at the rest stop, Gorham was standing outside a blue Mazda Navajo. Fautt asked Gorham if he owned the Mazda. Gorham replied that he had just purchased it. When Fautt asked for identification, Gorham produced a Florida driver's license. Gorham told Fautt he and his girlfriend, Francesca Schleicher, were resting during a road trip from San Diego to Montana.

Fautt asked Gorham if there were any weapons in the car.<sup>3</sup> Gorham said there was a loaded handgun on the front floorboard and a rifle in the back.<sup>4</sup> Schleicher was sitting in the front passenger seat. Fautt reached into the car and took a loaded handgun from the transmission hump in front of the center console. Fautt saw air fresheners, incense, and a small baggie containing .32 grams of methamphetamine in the cup holder of the center console. There was also an empty ammunition clip for the handgun.

Fautt searched Schleicher's fanny pack, which Schleicher was clutching, to see if there were additional weapons. Fautt found a ceramic marijuana pipe, a glass methamphetamine pipe, two ecstasy pills, and a brown vial containing 1.01 grams of

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<sup>3</sup> Gorham filed a brief with this court raising various evidentiary and procedural issues. We have reviewed these contentions and find they are without merit.

<sup>4</sup> At the preliminary hearing, Fautt testified that he asked Gorham if he had been convicted of any crimes. Gorham replied that he had two armed robbery convictions.

methamphetamine. In the center console underneath the cup holder, a canine later alerted to the presence of an illegal narcotic. Officers found a bag containing 821.8 grams of methamphetamine. There were also bullets for the handgun and the rifle in the center console. A functioning rifle was found in the rear of the vehicle, along with a day planner with monetary figures and numbers written in grams, a scale, and a bindle containing .21 grams of methamphetamine. Gorham admitted that a duffle bag found in the vehicle containing Ziploc baggies, clothing, and ammunition belonged to him.

Faultt and other officers interrogated Gorham at a highway patrol station after reading him his *Miranda* rights.<sup>5</sup> Faultt explained that Gorham changed his story several times but finally stated that Schleicher was transporting the methamphetamine that was located in the console. Gorham told Faultt he and Schleicher purchased the large package of methamphetamine for \$18,500 from someone named Veronika during their stay in San Diego. Gorham explained that he and Schleicher were going to be paid \$6,000 for delivering the package to Montana. A day planner found in the defendants' possession listed Veronika's name and phone number in Southern California.

Faultt thought Gorham had a distinct knowledge of narcotics. Gorham told Faultt the connections they made in Southern California were Schleicher's. Faultt explained that Gorham said he left Montana with Schleicher knowing they were going to meet her contacts.

Francesca Schleicher testified that in September of 2002, she was engaged to Gorham. Schleicher was a drug runner but Gorham was unaware she was running drugs and he was not aware of the arrangements she had made. Schleicher explained she made drug related phone calls when Gorham was outside the car pumping gas or using the rest room. Schleicher asserted she purchased the methamphetamine without Gorham's

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<sup>5</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

knowledge. Schleicher testified she did not inform Gorham about the drugs until they were under arrest at the rest stop. Schleicher explained she packaged the drugs herself.

Schleicher claimed that she wrote all of the entries into the day planner. Schleicher explained that the smaller quantities of methamphetamine also belonged to her. Schleicher wrote a letter to Gorham on December 28, 2002, apologizing to him for failing to tell him everything about her life and for not telling him about the drugs in the vehicle. Schleicher testified she purchased the rifle and handgun from a pawnshop in Livingston, Montana. Schleicher was registered and licensed to own the guns and had hunting licenses for elk and bear.

### **SENTENCING HEARING**

Gorham filed a brief requesting that the trial court strike some of his prior serious felony convictions so that he would not receive a 25 years to life sentence under the three strikes law pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. Gorham further argued that a 25 years to life sentence was cruel and unusual punishment. The prosecutor filed a sentencing brief requesting that Gorham receive consecutive 25 years to life sentences for transportation and for being a felon in possession of a firearm and that consecutive sentencing was mandatory pursuant to section 667, subdivision (c)(6) & (7).

At sentencing, the trial court explained why it would not strike any of Gorham's prior convictions. The court noted it had thought over Gorham's motion because since his most recent stay in prison, he had not committed any new felony offense except for the current ones. The court noted between 1983 and his release from prison in 1998, Gorham had committed four felonies. After Gorham was released from prison, he committed new misdemeanor offenses every year thereafter. Some of these offenses were violent, others involved drugs.

The court noted Gorham failed to demonstrate that he has rehabilitated himself after his release from prison. The court found the amount of controlled substance

involved was large and concluded it could not justify using its discretion to strike any of Gorham's prior serious felony convictions.

Turning to the issue of whether to sentence Gorham to consecutive sentences on counts one and four, defense counsel stated that his understanding was that the court had to impose consecutive sentences. The judge then said: "The court is satisfied from reviewing the cases cited in the People's motion that I must sentence him consecutive on Count IV. The offense clearly started before the offense alleged and proven in Counts I, II, and III, so it is a separate offense, and, accordingly, I must separately sentence him to another consecutive term."

### **DISCUSSION**

We sought briefing from the parties on the issue of whether Gorham's convictions arose on the same occasion or from the same set of operative facts. We find that Gorham's conduct arose from a single occasion and on the same set of operative facts. The trial court expressly stated that it had no discretion to sentence Gorham to concurrent rather than to consecutive sentences pursuant to the three strikes law. Because we find the court did have sentencing discretion, we will vacate Gorham's sentence and remand for the trial court to exercise its discretion to impose either concurrent terms on counts one and four or to impose consecutive terms on those counts.

The trial court believed that it had to sentence Gorham to consecutive terms on counts one and four because of the cases cited in the People's sentencing brief. The People cited *People v. Durant* (1999) 68 Cal.App.4th 1393 in support of its theory that consecutive sentences were mandatory under the three strikes law. The defendant in *Durant*, while under surveillance, committed one burglary and two attempted burglaries on the same day. (*Id.* at pp. 1399-1400.) The trial court found it had discretion under the three strikes law to sentence the defendant to concurrent terms for the burglary and two attempted burglary convictions. (*Id.* at p. 1400.)

The court in *Durant* held the three offenses did not occur on the same occasion and did not arise from the same set of operative facts. The *Durant* case found that each offense was distinct even though they were committed in sequence and close together in time. (*People v. Durant, supra*, 68 Cal.App.4th at pp. 1401-1407.)

The California Supreme Court relied upon the *Durant* decision in *People v. Lawrence* (2000) 24 Cal.4th 219, 231-233. The defendant in *Lawrence* was convicted of petty theft with a qualifying prior conviction, a felony, and assault with a deadly weapon likely to cause great bodily injury. The assault occurred about five minutes after the theft as the defendant was attempting to flee. (*Id.* at pp. 223-225.) The Supreme Court found the defendant's offenses did not occur on the same occasion, because they were not in close temporal and spatial proximity. (*Id.* at pp. 226-229.) The offenses also did not occur from the same set of operative facts. (*Id.* at pp. 230-234.)

We find *Lawrence* and *Durant* distinguishable from the facts of the instant action. The separate offenses committed by the defendants in those cases were distinct and complete. The offenses were close in time but did not overlap with one another. The trial court here apparently relied on evidence at trial that Gorham and Schleicher had possessed the guns prior to obtaining and transporting methamphetamine in Southern California and that Gorham's possession of guns was already a completed offense before he transported drugs.

Though the elements of being a felon in possession of a firearm were likely satisfied prior to the time Gorham and Schleicher acquired the methamphetamine, both the transportation and felon in possession of a firearm offenses were ongoing crimes, not distinct offenses as in *Durant* and *Lawrence*. Here, both offenses overlapped both temporally and spatially.

The information itself alleged that Gorham's transportation of methamphetamine included a personal arming enhancement pursuant to section 12022, subdivision (c). In charging Gorham with the crime of transportation of methamphetamine, the People

viewed his possession of the gun as related to and a part of the transportation offense. The methamphetamine was found in the center console of the vehicle. The handgun was on the transmission hump immediately in front of the center console. Gorham had been driving the car right next to the gun and the methamphetamine. This constituted immediate, overlapping temporal and spatial proximity between the criminal acts alleged in counts one and four.

The trial court's statement that Gorham's possession of the gun began prior to the transportation offense is an observation appropriate for analysis of whether section 654 applies. It is not an observation which is useful for analyzing whether these offenses occurred on the same occasion or under the same set of operative facts.

Section 654 is not violated where a defendant is punished both for committing a firearm related offense and for being a felon in possession of a firearm where there is evidence the defendant possessed the firearm prior to the other offense. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1142-1149.) The fact that Gorham could be punished both for being a felon in possession of a firearm and for transportation of drugs pursuant to section 654 is not dispositive of whether or not the offense has occurred on one occasion pursuant to the three strikes law. The California Supreme Court analyzed this issue and concluded that section 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively. (*People v. DeLoza* (1998) 18 Cal.4th 585, 594-595.)

We find the facts of *DeLoza* to be controlling in our analysis. The defendant in *DeLoza* committed an armed robbery simultaneously of four people in a furniture store. (*People v. DeLoza, supra*, 18 Cal.4th at p. 589.) The *DeLoza* court found "the crimes were so closely related in time and space, and committed against the same group of victims, that these factors alone compel us to conclude they occurred on the 'same occasion.'" The court concluded consecutive sentences were not mandatory under subdivisions (a)(6) and (a)(7) of section 1170.12. (*Id.* at p. 599.)



“[W]here a sentencing court determines that two or more current felony convictions were either ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts’ . . . consecutive sentencing is not required under the three strikes law, but is permissible in the trial court’s sound discretion.” (*People v. Lawrence, supra*, 24 Cal.4th at p. 233.)

Where the trial court indicates it has no discretion on the issue of consecutive and concurrent sentencing, clearly demonstrating that it misunderstands its sentencing discretion, the case must be remanded for the trial court to exercise its sentencing discretion.<sup>6</sup> (*People v. DeLoza, supra*, 18 Cal.4th at pp. 599-600.) The parties concede the trial court believed it had no discretion to consider a concurrent sentence of counts one and four. We do not express any opinion, nor do we mean to infer, as to how the trial court should exercise its discretion in choosing between concurrent or consecutive sentences.

### **DISPOSITION**

The sentence is vacated and the case is remanded for the trial court to exercise its discretion whether to impose fully consecutive 25 years to life terms on counts one and four, or, whether to sentence Gorham to concurrent 25 years to life terms on counts one and four. Gorham’s convictions are affirmed.

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<sup>6</sup> In response to our request for briefing, Gorham has raised the additional issue that his consecutive sentence violates his right to a jury trial as recently discussed by the United States Supreme Court in *Blakely v. Washington* (2004) 540 U.S. 965. It is possible that on remand Gorham could receive a concurrent rather than a consecutive sentence. We therefore find the issue is not ripe for review and we decline to reach it. (See *California Alliance for Utility Etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1029.) On remand, Gorham may argue this point to the trial court at the resentencing hearing should the court make his sentences consecutive.